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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 45

LOU POLLER,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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LOU POLLER, *Petitioner*, v. COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG, *Respondents.*	No. 690

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (JA 282-6)* is reported at 174 F. Supp. 802. The opinion of the Court of Appeals is appended to the petition, and is reported at 284 F. 2d 599.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

*References designated "JA" are to pages of the Joint Appendix

QUESTIONS PRESENTED

Whether Section 1 or Section 2 of the Sherman Act was violated by the owner of a television network which terminated an affiliation agreement with petitioner's station, in accordance with its terms, because the network had contracted to purchase another television station in the market over which it planned to broadcast its own programs.

Whether petitioner was injured in his business or property as a result of any violation of the Sherman Act when the respondent network exercised its contract right to terminate the affiliation agreement with petitioner's station.

THE STATUTES INVOLVED

The pertinent statutory provisions are adequately identified in the petition and are printed in an appendix thereto.

STATEMENT

Petitioner is the assignee of Midwest Broadcasting Company ("Midwest"), a dissolved Wisconsin corporation of which he was president. Respondent Columbia Broadcasting System, Inc. ("CBS") is the owner of television stations and the operator of a national television network. CBS Television is the unincorporated division of CBS in which its television operations were conducted. It was named as a defendant, but did not appear because it is not a legal entity capable of being sued. Respondent J. L. Van Volkenburg was an officer, and respondent H. K. Akerberg an employee, of CBS.

In August 1953, when Midwest was about to commence operation of a UHF television station in Milwaukee, it entered into an affiliation agreement (JA 57-60) with CBS which contained a clause, modifying the general form, per-

mitting termination thereof by CBS at any time on six months' notice (JA 59). Such a clause was included in many of the CBS affiliation agreements (JA 35-41, 159). It was intended to indicate to the affiliate that the relationship was a trial (JA 159, 161, 183), and it was so understood by petitioner (JA 95-9). Petitioner repeatedly attempted to have the six-month termination clause deleted from the contract, but without success (JA 94-5, 99). He used the CBS insignia with "trepidation" (JA 99).

CBS had long been an advocate of UHF television (JA 205); it had urged the Federal Communications Commission to allow networks and other multiple owners to acquire UHF stations without reducing the number of VHF stations which they might own (JA 252-7). CBS had announced that if the Commission were to adopt a proposed rule allowing a single licensee to own two UHF, in addition to five VHF, stations, CBS intended to acquire such UHF stations (JA 50, 257).

Anticipating the adoption of that proposed rule, CBS undertook in July 1954 to put itself in a position to acquire a UHF station in Milwaukee (JA 50). CBS had heard from a number of sources that petitioner had been trying to sell his station at a price which it considered greatly excessive (JA 152, 163, 179, 184, 199), and chose not "to enter into any kind of trading" with petitioner (JA 184). The company thought that it could buy station WOKY, the other UHF station in Milwaukee, owned by defendant Bartell Broadcasters, Inc., at a reasonable price (JA 152), and asked the defendant Holt to go to Milwaukee to negotiate for an assignable option to purchase that station (JA 91). Holt obtained such an option and assigned it to CBS (JA 89, 91-2). It was exercised in October 1954.

On October 21, 1954, the day before the new FCC rule became effective (JA 50), CBS gave Midwest notice

of the termination of its affiliation agreement. The following day, petitioner met with representatives of CBS in New York. He complained of the termination and stated that he had gone to great expense for a new studio and equipment (JA 50, 197-8). As a result of the ensuing discussion, an agreement (JA 61-84) was reached under which CBS took over such studio and equipment from Midwest, transferred to Midwest the equipment which it had bought from WOKY, and paid to Midwest the sum of $500,000. Petitioner acknowledged that he was reimbursed in full for the sums which he had spent on the studio and that CBS assumed the obligations of Midwest for an uncompleted building (JA 105).

When CBS acquired its Milwaukee station, there were two VHF stations in the market (JA 241-2). One of them was WTMJ, a primary NBC affiliate (JA 160, 238), which was "a giant" (JA 155). Later, a third VHF station went on the air, and CBS operated the only UHF station in the country that was in competition with three VHF stations in the same market (JA 209).

Nationally, CBS, at the time it contracted for the Milwaukee station, owned three stations out of a total of 386 that were then on the air (JA 52). It had affiliation agreements giving it option time on 127 stations, less than one-third of the total number on the air (JA 52). During the year 1954, CBS' share of the aggregate of time sales to national and regional advertisers represented 23.3% of the industry total of such sales (JA 86).

Television advertising is of three types: network, national spot and local. Network advertising is placed by national advertisers with a network organization; national spot advertising is placed by such advertisers directly with individual stations (JA 85). Of the fifty largest CBS television network customers in 1955, 78% also used national

spot advertising and 50% were included in the one hundred largest national spot advertisers (JA 54). During the same year, of the fifty largest CBS television network customers, 76% also advertised on at least one other television network, and 58% were among the fifty largest customers of at least one other television network (JA 54). Television is also in competition with all the other media of national advertising, including newspapers, magazines, billboards and radio (JA 54).

CBS operated the Milwaukee station for over four years, but closed it on March 31, 1959 (JA 272).

Petitioner's own statements reflect the inherent difficulties which confronted all UHF stations with VHF competition. His complaint (JA 13-14) refers to the fact that initially all television broadcasting was in the VHF band; and that when, in June 1952, the Federal Communications Commission authorized the use of UHF channels, few, if any, receivers in the hands of the public were equipped to receive UHF signals, so that "the success of UHF stations was extremely problematical." His opposing affidavit (JA 247-8) refers to the decrease in the number of UHF stations on the air from 121 in December 1953 to 84 in November 1958.

The present action was commenced in September 1956, eighteen months after the transaction between CBS and Midwest was concluded. The complaint (JA 6-23) charges a conspiracy to restrain trade in the television industry in violation of Section 1, and monopolization and attempt to monopolize in violation of Section 2, of the Sherman Act. It alleges (JA 22-3) that the fair value of the Midwest station was at least $2,000,000, and that Midwest received from CBS $500,000 in cash and equipment in the value of $50,000, so that it suffered damages in the sum of $1,450,000.

In September 1957, after respondents had answered lengthy interrogatories and had taken petitioner's deposition, they moved for summary judgment (JA 46). Petitioner took a number of depositions for use on the motion, and his opposing affidavit (JA 235-51) was not served until March 1959.

The District Court granted respondents' motion for summary judgment (JA 287), and the Court of Appeals affirmed.

ARGUMENT

This case presents no issue of general significance under the antitrust laws. There is no claim that a conflict of decisions between the circuits is presented. There is no important question which is likely to recur in another case. The only issue is whether established principles were appropriately applied to a particular situation.

Petitioner's claim that the Court below adopted novel doctrines regarding affirmative antitrust defenses rests upon a misconstruction of the Court's opinion. The Court clearly held that no violation of the statute was shown, and did not consider affirmative defenses to what otherwise would be actionable.

The case presents the simplest possible example of a unilateral determination by a producer as to the method of distributing its own programs in a single market. The decision below does not conflict with any decision of this Court. It is fully in accord with a large body of recent authority.

Petitioner had the fullest opportunity to develop his version of the facts in pretrial proceedings. As to the material facts, there is no issue. Essentially, petitioner's case under both Sections 1 and 2 rests on legal premises which

are plainly erroneous. Petitioner uses the terms "monopoly" and "monopoly power" in a loose, inaccurate sense. He disregards the uncontroverted evidence that television, both nationally and locally, was characterized by intense competition. Such competition exists between networks and between stations and with other advertising media. Of course, the "monopoly" of each program producer in its own programs, like that of a manufacturer in the products bearing his brand, is not the monopoly which the antitrust laws prohibit.

Dismissal of the case on summary judgment was proper, and in accordance with a large body of authority.

It would be obviously inappropriate for the Court in this private case, to which neither the Government nor the Federal Communications Commission is a party, to undertake the kind of general review of conditions in the television industry which petitioner requests. Industry practices which he criticizes are wholly unrelated to his alleged injury.

The lack of merit in the petition will be shown by considering in turn each of petitioner's asserted reasons for granting the writ.

1. There is no basis for petitioner's assertion that the Court below introduced new defenses of contributory negligence and estoppel in antitrust cases.

The Court held both that there was no violation of the Sherman Act and that, even if the Act had been violated, such violation was not the cause of the alleged injury of which petitioner complains. In the latter connection, the Court observed that petitioner's claimed loss resulted from his expansion of the station when he knew that he did not have a firm affiliation agreement, and that the high value

which he placed on his station depended upon his having such an agreement. The accuracy of these statements is not, and obviously cannot be, challenged, for they rest on petitioner's own admissions (JA 94, 95, 97-100).

That the Court did not, as petitioner claims, purport to recognize affirmative defenses to violations of the statute appears plainly from its opinion. The Court's discussion of the claim under Section 1 concludes (Appendix to Petition, p. 22):

> "We conclude from the foregoing that the acts done by CBS and its co-defendants did not restrain trade or commerce. Hence, any injury to Poller's business and property caused by those acts was not the result of a violation of Section 1 of the Sherman Act."

Similarly, with respect to Section 2, the Court wrote (p. 25):

> " . . . We perceive no monopoly or attempt to monopolize but, instead, an unsuccessful attempt to compete with other Milwaukee stations. . . . Of course, the competitive situation among the networks continued as before."

These explicit declarations that the statute was not violated rest on elementary antitrust considerations. They show the error in petitioner's claim that the Court "created new law" by the recognition of defenses to justify action which would otherwise have been illegal.

2. This case does not even approach the outer limits of *United States* v. *Colgate & Co.*, 250 U. S. 300. Certainly, nothing in the antitrust laws required CBS, when it decided to enter into the Milwaukee market, to buy petitioner's station rather than that of Bartell. Having elected to buy the Bartell station, CBS terminated petitioner's affiliation

agreement in accordance with its terms. The case presents an example, in its simplest form, of the exercise by a single producer of its right to select the outlet for its own product.

The decision below does not conflict with any of the decisions of this Court cited by petitioner. The termination of petitioner's affiliation agreement entailed no suppression of price competition among buyers of a producer's goods, such as was involved in *United States* v. *Parke, Davis & Co.*, 362 U. S. 29. In *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, the manufacturer who cut off a dealer's supplies had been found in a prior action by the Government to have a monopoly (273 U. S. at 369). *United States* v. *Griffith*, 334 U. S. 100, and *Schine Chain Theaters* v. *United States*, 334 U. S. 110, involved the misuse in competitive markets of the power which the defendants obtained because they were monopolists with the only theaters in other markets. *United States* v. *Radio Corporation of America*, 358 U. S. 334, likewise involved more than merely the selection of an outlet in a particular market; the coercion there challenged was the termination and withholding of network affiliations in other markets in order to induce an exchange in a particular market. To the extent that *United States* v. *Columbia Steel Co.*, 334 U. S. 495, has any relevance, it tends to establish the legality of the degree of "vertical integration" that was effected by the action here challenged.

Petitioner's reference to "leverage power" is circular. It assumes the existence of the monopoly which petitioner seeks to prove. What CBS did was to exercise the right which it had specifically reserved to terminate the arrangement by which it was distributing its own programs in a single market, and to undertake such distribution through its own outlet. In holding that no violation of the Sherman Act was involved, the decision below is in

accord with a large volume of recent authority. *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. den. 355 U. S. 822; *Schwing Motor Co.* v. *Hudson Sales Corp.*, 239 F. 2d 176 (4th Cir.), cert. den. 355 U. S. 823; *Miller Motors, Inc.* v. *Ford Motor Co.*, 252 F. 2d 441 (4th Cir.); *Nelligan* v. *Ford Motor Co.*, 262 F. 2d 556 (4th Cir.); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911 (5th Cir.), cert. den. 345 U. S. 925.

The rule of these cases is not rendered inapplicable by the fact that CBS undertook itself to broadcast its programs in the market rather than select another station to do so. *Cf. Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534 (7th Cir.), cert. den. 345 U. S. 942; *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F. 2d 289 (2d Cir.). Indeed, that fact improved petitioner's situation. If CBS had changed affiliates, a course which concededly would have been legal (JA 108), it would have had no occasion to relieve petitioner of his recently incurred investment in studio equipment.

There is no merit in petitioner's charge that the important economic facts were considered irrelevant by the Court below. The record contains undisputed evidence as to the highly competitive conditions in the television industry, both nationally and in Milwaukee. To avoid the obvious reality of that competition, petitioner has resorted to definitions of the relevant market which are wholly unreal. The opinion below (Appendix to Petition, pp. 23-4, footnote 6) refers to his claim—which is not renewed in the petition—that CBS is a monopolist because, due to physical factors, each network has a "vertical monopoly" in its own programs. Here, the market which CBS is claimed to have monopolized is "UHF in Milwaukee" (Petition, p. 9), and that is the position which

petitioner's attorney took when he was pressed by the District Court to define the relevant market for the purpose of his monopoly charge (JA 275).

That position destroys petitioner's claim under Section 2. In view of the intense competition which CBS faced from the preferred VHF stations in the same city, UHF in Milwaukee is plainly not a relevant market for the purpose of that Section. *Cf. United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377.

In short, as to Section 1, the *Colgate* rule is clearly applicable, and petitioner's case under Section 2 rests on a fallacious concept of the relevant market. His argument under both Sections disregards the competitive situation among the networks, as well as the fact that the CBS station in Milwaukee faced competition from two, and later three, VHF stations with decided advantages over CBS,—competition to which it ultimately succumbed. The conclusion of the Court below that the failure of UHF in Milwaukee was due to the superiority of VHF competition accords with the well known facts of the industry which had previously been noted by that Court (*Greylock Broadcasting Co.* v. *United States*, 231 F. 2d 748, 749), and also with the allegation in petitioner's complaint (JA 13-14) as to the "extremely problematical" success of UHF stations.

3. An additional ground for the decision below that Section 1 was not violated is that the action of which petitioner complained was not the result of a conspiracy, but was the unilateral action of CBS.

The petition attacks one aspect of that decision. It asks that the writ be granted in order to review the holding that there can be no conspiracy between CBS and its unincorporated division, CBS Television. This request should be rejected for two reasons. First, the question need not be

reached, since the decision that there was no restraint disposes of the Section 1 claim. Secondly, petitioner's contention on the point is obviously unsubstantial. CBS Television is not a separate legal entity, but an administrative division of the corporation. In *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 606, Mr. Justice Jackson, dissenting, referred to a concession by the Government that there can be no conspiracy between a corporation and its unincorporated division. That position was reiterated in the Report of the Attorney General's Committee on the Antitrust Law (p. 35).

Petitioners position would make it impossible for any large corporation which is organized into separate departments to coordinate its activities. Any unilateral price action taken by a corporate division with the approval of top corporate management would be a "conspiracy". The publication by General Motors of a price scale for cars made by its several divisions would violate Section 1. This would read the conspiracy requirement out of the statute. *Cf. Nelson Radio & Supply Co.* v. *Motorola, Inc.,* 200 F. 2d 911, 914 (5th Cir.), cert. den. 345 U. S. 925.

4. Summary judgment was properly granted because there was no issue as to any material fact. The points on which it is claimed that the Court below erroneously accepted CBS' version of disputed facts are not conceivably determinative of the case. They are material only under petitioner's mistaken assumption that disparity in bargaining power alone creates a triable issue under the Sherman Act. CBS was under no duty to deal with petitioner for the purchase of his station. Its reason for not doing so is irrelevant.

The essential facts regarding the transaction are established by documents and are undisputed. Petitioner had the

widest latitude in conducting discovery proceedings, and the motion was not submitted to the Court until after those proceedings had been concluded. The issue presented is one of law, and the propriety of determining that issue on motion is established by abundant authority. *Cf. Schwing Motor Co.* v. *Hudson Sales Corp.*, 239 F. 2d 176 (4th Cir.), cert. den. 355 U. S. 823; *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522 (2d Cir.); *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F. 2d 289 (2d Cir.); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911 (5th Cir.), cert. den. 345 U. S. 925; *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822, rehearing denied 130 F. 2d 196 (2d Cir.), cert. den. 317 U. S. 695; *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F. 2d 332 (4th Cir.). See also *Packard Motor Car Co.* v. *Webster Motor Car Co., supra,* where a judgment entered on a verdict for the plaintiff was reversed.

5. Finally, petitioner would have this Court utilize this private action to review various practices in the television industry which are the subject of extensive regulation. He seeks to analogize such practices to those which were condemned in the motion picture industry in *United States* v. *Paramount Pictures Corp.*, 334 U. S. 131. Petitioner overlooks the fact that there is here no claim of a horizontal conspiracy among competitors, such was found in the *Paramount* case. He also overlooks the obvious impropriety of such a general inquiry in a private action, in which neither the Government nor the Federal Communications Commission is a party, and in which but a single narrow issue is presented.

The Court below was plainly right in holding that petitioner's alleged injury was not caused either by the "must buy" policy, by which time was offered to adver-

tisers on a designated group of stations, or by the "option time" practice, under which affiliates contract to accept network programs offered during designated hours. Cf. *Affiliated Music Enterprises* v. *Sesac, Inc.*, 268 F. 2d 13 (2d Cir.), cert. den. 361 U. S. 831. Nor, as was also held below, does this case call for review of the Commission rule authorizing a network to own a limited number of stations. The sole issue is whether the particular transaction in which CBS terminated petitioner's affiliation agreement violated either Section 1 or Section 2 of the Sherman Act. That issue was decided with full recognition of the principles established by this Court's decisions.

What the petition asks, in effect, is that, despite the highly competitive conditions which are shown by the record, this Court should adopt a rule retroactively outlawing network ownership of stations under all circumstances. Petitioner's plea is addressed to the wrong branch of the Government, in the wrong proceeding, and by the wrong party.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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